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18
19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF ARIZONA**

21 The Church of the Eagle and the Condor, *et al.*,
22 Plaintiffs,
23 v.
24 Merrick Garland, *et al.*,
25 Defendants.

26 **Case No. 2:22-cv-01004-PHX-SRB**
27 **PLAINTIFFS' MOTION FOR**
28 **AWARD OF ATTORNEYS' FEES**
AND RELATED NON-TAXABLE
EXPENSES

Oral Argument Requested

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Pursuant to Local Rule 54.2(b)(2), Plaintiffs, The Church of the Eagle and the Condor, an Arizona Religious Corporation, on its own behalf and on behalf of its members, Joseph Tafur, M.D., Individually and as Spiritual Leader of The Church of the Eagle and the Condor, Belinda Eriacho, M.P.H., Kewal Wright, Benjamin Sullivan and Joseph Bellus, (Plaintiffs) hereby move for an award of attorneys' fees and related, non-taxable expenses against named Defendants in this action. This Motion is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Now before this Court is Plaintiffs' Memorandum in Support of its Motion for an Award of Attorneys' Fees and Related Non-Taxable Expenses.

II. ARGUMENT

A. Eligibility

Plaintiffs are the prevailing party in this litigation. As such, under RFRA, 42 U.S.C. § 2000bb, they may seek attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which specifically identifies RFRA as a source of eligibility. Plaintiffs are also entitled to costs, including expert fees, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §§ 2412 and 2412(d)(1)(A).

Plaintiffs are entitled to fees and costs for their successful Freedom of Information Act ("FOIA") claim pursuant to 5 U.S.C. § 552(a)(4)(E). As is explained herein, the FOIA requests and subsequent litigation were part of Plaintiffs' RFRA case and can also be compensated under 42 U.S.C. § 1988 and the EAJA.

Plaintiffs have completely prevailed insofar as The Church of the Eagle and the Condor ("CEC" or "Church") may now continue to import, possess, and use ayahuasca for religious purposes. Plaintiffs obtained a settlement granting the CEC and its members all that they had requested. This truly is a description of the paradigmatic "prevailing party."

The Settlement Agreement not only "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the

plaintiff,” but it also includes a “judicial *imprimatur*,” *Watson v. County of Riverside*, 300 F. 3d 1092, 1096 (9th Cir. 2002), because the parties have agreed that this Court will retain jurisdiction to enforce the Settlement Agreement (see **Exhibit A, Settlement Agreement IX. ¶91.c.)** and determine fees and costs pursuant to the terms of the Settlement Agreement. **(Settlement Agreement VII. ¶88)**. See *Richard S. v. Dep’t of Developmental Servs.*, 317 F.3d 1080, 1086-7 (9th Cir. 2003) (quoting *Fischer v. SJB P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-13 (1992))). See also *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134-5, n. 5 (9th Cir. 2002) (“Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys’ fees, thus providing sufficient judicial oversight to justify an award of attorneys’ fees and costs”) (quoted with approval in *P.N. v. Seattle School District No. 1*, 458 F. 3d 983, 991 n. 5 (9th Cir. 2006)).

Plaintiffs need not prevail on all claims for full compensation. As long as the claims upon which Plaintiff failed to prevail are related to the successful claims and Plaintiff obtained excellent results, full compensation is appropriate. *Schwarz v. Sec’y of Health & Human Servs.*, 73 F. 3d 895, 901-02 (9th Cir. 1995). See also *Church of the Holy Light of the Queen v. Holder*, 584 Fed. Appx. 457, 459 (9th Cir. 2014); *Bauer v. Sampson*, 261 F. 3d 775, 786-87 (9th Cir. 2001) (a party’s failure on some causes of action may still entitle the party to a full award of fees), *cited with approval*, *Navajo Nation v. Arizona Indep. Redistricting Comm’n*, 286 F. Supp. 1087, 1095 (D. Ariz. 2003). The “most critical factor” a court must assess in fashioning a fee award is the degree of success obtained. See *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

B. Entitlement to Fees under 42 U.S.C. § 1988 as a Prevailing Party

Plaintiffs are a prevailing party under RFRA as the Settlement Agreement provided relief exclusive to Plaintiffs’ RFRA claim.

“‘[A] court’s discretion to deny fees under § 1988 is very narrow and . . . fee awards should be the rule rather than the exception.’” *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008) (quoting *Herrington v. Cnty. of Sonoma*, 883 F.2d 739, 743 (9th

1 Cir. 1989)). As the prevailing party and having succeeded on all of the issues for which
 2 they sought relief, Plaintiffs should be compensated for all of the work reasonably
 3 expended in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). *See also Davis*
 4 *v. County of Los Angeles*, 8 E.P.D. para. 9444 (C.D. Cal. 1974), *citing Hensley*, [“Plaintiffs’
 5 counsel are entitled to an award of fees for all time reasonably expended in pursuit of the
 6 ultimate result achieved.”] Non-Taxable Expenses (costs) are also compensable under §
 7 1988. *Harris v. Marhoefer*, 24 F. 3d 16, 19-20 (9th Cir. 1994).

8 **C. Entitlement to Fees and Costs under the Equal Access to Justice Act**

9 As prevailing parties, plaintiffs are entitled to recover costs, and other expenses,
 10 including expert fees, under EAJA, 28 U.S.C. § 2412.

11 As such, an award of costs under EAJA is mandatory. Defendants’ position was not
 12 substantially justified, and no special circumstances exist. *Gonzales v. O Centro Espirita*
 13 *Beneficente União Do Vegetal*, 546 U.S. 418 (2006) (“UDV” case). Provided a party is
 14 eligible, “an award of fees [and costs] under EAJA is mandatory unless the government’s
 15 position is substantially justified or special circumstances exist that make an award unjust.”
 16 *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991).

17 A party is eligible for expert witness fees, costs, and other expenses under EAJA if
 18 it (1) is a “prevailing party” that (2) incurred costs of litigation against the federal
 19 government, and (3) meets applicable size and net worth criteria, or is incorporated under
 20 section 501(c)(3) of the Internal Revenue Code. 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(B).
 21 Plaintiffs clearly satisfy all three criteria for eligibility. As discussed herein Plaintiffs are
 22 clearly a prevailing party. Plaintiffs incurred the costs of this litigation against the U.S.
 23 Departments of Justice (“DOJ”), Drug Enforcement Administration (“DEA”) Homeland
 24 Security (“DHS”), components of the federal government. The third criterion is satisfied
 25 because all plaintiffs meet the applicable size and net worth criteria. (See, **Exhibit B,**
 26 **Declarations of CEC**).

27 Plaintiffs request that this Court award related non-taxable costs in the amount of
 28 \$65,391.95. (Decl. M. Hartney, ¶66, Exh. C; Decl. J. Silver, ¶111, Exh. G).

1 1. The Government's Position Was Not Substantially Justified

2 The agencies, defendants DOJ, DEA and DHS, bear the burden of proving that their
 3 position was substantially justified. *Oregon Natural Resources Council v. Marsh*, 52 F. 3d
 4 1485, 1492 (9th Cir. 1995). The agencies also bear the burden of proving that any special
 5 circumstances make an award unjust. *Love*, 924 F.2d at 1495. Whether the position of the
 6 federal government was substantially justified is determined based on the record regarding
 7 the action of the federal government that is the basis of the civil action and the record of
 8 the litigation. 28 U.S.C. § 2412(d)(1)(B). Whether the Government action is substantially
 9 justified is essentially a test of reasonableness. *League of Women Voters v. FCC*, 798 F.2d
 10 1255, 1257 (9th Cir. 1986). In other words, to determine if an agency position was
 11 substantially justified, the court considers the reasonableness of the underlying government
 12 action and the position asserted by the agency in court defending its actions. *Kali v. Bowen*,
 13 854 F.2d. 329, 332 (9th Cir. 1988); *Commissioner, INS v. Jean*, 496 U.S. 154, 158 n.7
 14 (1990) (noting that Congress intended to provide for fees when unjustifiable agency action
 15 forces litigation). A finding that “either the government's underlying conduct *or* its
 16 litigation position was not substantially justified is sufficient to support an award of EAJA
 17 fees.” *Cervantez v. Sullivan*, 739 F. Supp. 517, 521 (E.D. Cal. 1990) (emphasis added). An
 18 award of fees and costs is still appropriate even where there is a finding that some aspects
 19 of the agency's position were substantially justified but the Court has determined the
 20 overall position was not. *United States v. Marolf*, 277 F.3d 1156, 1164 (9th Cir. 2002).

21 The DOJ should be held to a higher standard to show that its legal arguments were
 22 substantially justified. “[W]hen the government acts inconsistently, and subsequently loses
 23 a civil suit challenging its behavior, *it should be obliged* to make an especially strong
 24 showing that its legal arguments were substantially justified in order to avoid liability for
 25 fees under the EAJA.” *International Woodworkers, Local 3-98 v. Donovan*, 792 F.2d 762,
 26 765 (9th Cir. 1986) (emphasis in original) [citing *Spencer v. N.L.R.B.*, 712 F.2d 539, 561
 27 (D.C. Cir. 1983)].
 28

1 Once the petitioning party establishes prevailing party status, the government can
2 avoid payment of cost under EAJA only if it can show that its pre-litigation conduct *and*
3 litigation position were “substantially justified.” To meet this burden of proof, the
4 government must show that its position has a reasonable basis both in law and in fact. *See*
5 *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as
6 “‘justified in substance or in the main’ – that is, justified to a degree that could satisfy a
7 reasonable person”); *Jean*, 496 U.S. at 160 (“The single finding that the Government’s
8 position lacks substantial justification, like the determination that a claimant is a ‘prevailing
9 party,’ thus operates as a one-time threshold for fee [and cost] eligibility”); *Anthony v.*
10 *Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (“[O]nce a court determines that the
11 government’s position on the merits of the litigation is not substantially justified, it may
12 not revisit that question as to any component of the dispute.”). *See also Gomez-Beleno v.*
13 *Holder*, 644 F.3d 139, 145 (2nd Cir. 2011).

14 In 2006, the Supreme Court found that it would be “surprising” to find the
15 sacramental use of “hoasca” was not exempt from the Controlled Substances Act (“CSA”)
16 considering the exemption for the religious use of peyote, and that “the very reason
17 Congress enacted RFRA was to respond to a decision denying a claimed right to
18 sacramental use of a controlled substance.” *Gonzales v. O Centro Espirita Beneficente*
19 *União Do Vegetal*, 546 U.S. 418, 436-37 (2006). In 2009, in *Church of the Holy Light of*
20 *the Queen* (“CHLQ”) *v. Mukasey*, 615 F. Supp. 2d 1210 (D. Or. 2009) after a full trial on
21 the merits, Judge Panner determined that CHLQ, a Santo Daime church, had the right to
22 import, possess, and use ayahuasca for religious purposes. Both courts determined the
23 Government could not meet its burden to show a compelling interest in preventing the use
24 of ayahuasca for religious purposes. Given the unanimous decision of the Supreme Court
25 in the *UDV* case, the decision on the merits in the CHLQ case and the allegations in
26 Plaintiffs’ complaint, it was unjustifiable for the government to file a motion to dismiss
27 and continue to litigate CEC’s RFRA claim after losing the motion.
28

The government's position must be substantially justified as a whole. Courts generally do not award a portion of fees or costs by issue. *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1167–72 (9th Cir. 2019) (en banc); *Gatimi v. Holder*, 606 F.3d 344, 349 (7th Cir. 2010). *Commissioner, INS v. Jean*, 496 U.S. 154, 161-62 (1990); see also *Glenn v. Comm'r of Soc. Sec.*, 763 F.3d 494, 498-99 (6th Cir. 2014) (holding that substantial justification is not “a matter of comparing the number of successful claims to unsuccessful claims in a single appeal” but instead whether the government's position was reasonable as a whole).

2. No Special Circumstances Exist

The government has the burden of proving the existence of special circumstances that would make a fee award unjust. This provision of the EAJA is to be narrowly construed so as not to interfere with or defeat Congress' purpose in passing the EAJA.

Special circumstances include close or novel questions. Equitable considerations can mean that the prevailing party acted in bad faith or has “unclean hands.” The Ninth Circuit has held that the “the government's request for a voluntary remand [to the BIA] is not a ‘special circumstance’ that would relieve the government from the applicants' statutory entitlement to EAJA fees.” *Li v. Keisler*, 505 F.3d 913, 920 n.1 (9th Cir. 2007). Rather, the court collapsed its discussion of the special circumstances exception into its substantial justification analysis, holding that the court must examine “the likely reason behind the voluntary remand in question.” *Id.* at 919.

D. Entitlement to Fees for the FOIA Claim Under 5 U.S.C. § 552(a)(4)(E)

Under FOIA, Plaintiffs are entitled to fees and litigation costs as the substantially prevailing party. See 5 U.S.C. § 552(a)(4)(E). Once a court determines a party is eligible for an award under FOIA, it exercises its “discretion to determine whether the plaintiff is entitled to fees.” *Oregon Nat. Desert Ass'n v. Locke*, 572 F.3d 610, 614 (9th Cir. 2009).

As the record shows in this case, Plaintiffs obtained relief through the change in position by both the CBP and DEA. Initially, the CBP asserted several exemptions to justify the redaction of the SAMHSA document. Following initiation of the litigation, the

1 CBP released to Plaintiffs a less redacted version of the SAMHSA document, thus
2 acknowledging its prior redactions were not justified by law.

3 Prior to filing this action, the CBP made clear that its prior disclosure of the
4 SAMHSA document was final, and no further redaction would be removed. There was a
5 public benefit to the disclosure of the less redacted version because Plaintiffs worked with
6 other organizations to publicize the new version so the public could understand the CBP's
7 policy regarding the seizure of alleged sacramental substances at the border. The DEA
8 disclosed no documents prior to Plaintiffs filing this lawsuit. Following the filing, the DEA,
9 through the DOJ, released hundreds of documents responsive to Plaintiffs' FOIA request,
10 including releasing for the first time ever an Ayahuasca Risk Assessment. This disclosure
11 similarly would not have occurred but for the lawsuit. There was no reasonable basis to
12 withhold these documents after the FOIA request.

13 **E. Reasonableness of Requested Award**

14 A reasonable attorneys' fee is determined by calculating the "the number of hours
15 reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v.*
16 *Eckerhart*, 461 U.S. 424, 433 (1983). This figure is called the lodestar and is presumed to
17 represent an appropriate fee. *Davis v. City and County of San Francisco*, 976 F.2d 1536,
18 1541-42 (9th Cir. 1992).

19 1. Time and Labor Required of Counsel

20 To assist the Court in arriving at the "lodestar" figure, the Ninth Circuit has adopted
21 a list of factors to be considered where relevant, the so called "*Kerr* factors." *Carter v.*
22 *Caleb Brett LLC*, 757 F.3d 866, 869 (9th Cir. 2014) (quoting *Kerr v. Screen Extras Guild*,
23 526 F. 2d 67, 70 (9th Cir. 1975, *cert. denied*, 96 S. Ct. 1726 (1976)) (*abrogated on other*
24 *grounds by City of Burlington v. Dague*, 505 U.S. 557 (1992))). The following four (4) *Kerr*
25 factors relate to "the number of hours reasonably expended" portion of the lodestar
26 equation: (1) time and labor required, (2) difficulty of the questions involved, (3) time
27 limitations imposed by the circumstances, and (4) results obtained. *Golden Gate Audubon*
28 *Soc. v. U.S. Army Corps of Engineers*, 732 F. Supp. 1014, 1017 (N.D. Cal. 1989). The *Kerr*

1 factors are also relevant to the level of staffing needed successfully to prosecute this case.
2 Plaintiffs submit that a review of the time and labor expended by their attorneys in the
3 context of these factors establishes that the time claimed was appropriately expended and,
4 indeed, essential to the successful resolution of this case

5 2. Novelty and Difficulty of the Questions Presented

6 This was both a novel and complex case. There has not been a successful case of
7 this nature since the *Santo Daime* case in 2009, which was only the second such case
8 (preceded by the *UDV* case filed in 2000).

9 Unlike the *UDV* and *Santo Daime* faiths, the CEC is not a Christian religion and
10 does not have the same history of using ayahuasca as a sacrament as the other churches.
11 The plaintiffs in both of those cases were established Christian syncretic religions. The
12 CEC is an emerging religious group, so Plaintiffs retained the expertise of a theologian to
13 document their religious *bona fides* by interviewing members of the Church and attending
14 a ceremony to observe the religious rituals first-hand.

15 Since the *UDV* and *Santo Daime* cases, the DEA promulgated a Guidance
16 Document encouraging religious organizations to file petitions for religious exemption
17 from the CSA pursuant to the RFRA. Although numerous churches have applied for this
18 exemption using the DEA's Guidance Document process, none has received an exemption.
19 <https://www.gao.gov/products/gao-24-106630> Instead, they have been relegated to an
20 administrative entanglement that affords them little due process and less protection than
21 provided under RFRA.

22 In 2020 the DEA's Drug and Chemical Evaluation Section, Diversion Control
23 Division, released a document entitled *Ayahuasca: Risks to Public Health and Safety*. This
24 DEA document raised several technical and medical issues that Plaintiffs had to address,
25 necessitating the hiring of experts in medicine, psychiatry, toxicology, and epidemiology.
26 Given the rarity of this field of study, it was time-consuming both to find and to vet experts,
27 for which Plaintiffs' counsel Mr. Ali and Ms. Hartney were instrumental.

28 Very few RFRA cases involving the use of a Schedule I substance have been

1 litigated. Only two prior cases involving the use of ayahuasca as a sacrament have been
2 litigated successfully and, of those cases, only one was decided on the merits - *Church of*
3 *the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210 (D. Or. 2009). There are
4 very few attorneys who have experience litigating these Schedule I RFRA cases. Plaintiffs'
5 attorneys Jack Silver and Gilbert Paul Carrasco were also counsel in the *Santo Daime* case
6 and are two of only four attorneys in the entire nation who have litigated such a case on its
7 merits. Plaintiffs' attorneys Sean T. McAllister, Martha J. Hartney, and Ismail L. Ali are
8 nationally recognized psychedelic law experts with longstanding relationships to the CEC.

9 More than fifteen years have passed since the successful *Santo Daime* case was
10 filed, and the number of scientific papers exploring the safety and efficacy of ayahuasca
11 has grown substantially. Through discovery, Defendants submitted more than 120
12 scientific papers on the use of ayahuasca and DMT, every one of which had to be reviewed
13 in detail by an attorney. Plaintiffs identified more than 240 studies. The DEA's treatise,
14 *Ayahuasca: Risks to Public Health and Safety*, necessitated the consultation of experts in
15 psychiatry, toxicology, and epidemiology.

16 Defendants' Motion to Dismiss raised several issues not litigated in the previous
17 ayahuasca church cases. Once this Court denied Defendants' Motion to Dismiss as to
18 standing (associational and individual), as to failure to state a claim, and declined
19 Defendants' request for a stay, Plaintiffs moved forward with discovery and pre-trial
20 preparation. The case was made more challenging due to obstructionist opposition by
21 Defendants' counsel in the form of her persistent failure to respond to emails, failure to
22 comply with discovery requests, failure to provide dates for depositions, thus necessitating
23 the issuance and service of deposition subpoenas, and persistent objections to every request
24 made by Plaintiffs. In short, defense counsel significantly and, in many cases,
25 unnecessarily, complicated and protracted Plaintiffs' work.

26 3. Skill Requisite to Perform the Legal Service Properly

27 The skills of each attorney requisite to perform the legal service properly are
28 identified in each attorney's declaration filed in support of this motion.

1 4. Preclusion of Other Employment by Counsel Because of this Action

2 The preclusion of other employment by counsel because of the acceptance of the
3 action is presented in each attorney's declaration filed in support of this motion.

4 5. Customary Fee Charged in Matters of the Type Involved

5 There are no RFRA cases that can be used to determine the appropriate fee. Due to
6 the fact that Plaintiffs could not find an attorney in the State of Arizona whom they felt
7 was sufficiently qualified to handle their RFRA case and take it on a contingency, they
8 sought attorneys from out-of-state. Each attorney has provided the prevailing market rates
9 in his or her forum district.

10 Plaintiffs contacted the ten largest civil rights firms in Arizona to determine if any
11 had experience in a similar case and whether they would take Plaintiffs' case on
12 contingency, without success. (See Silver Decl., Exhibit B, Decl. Osuna). "[R]ates outside
13 the forum may be used 'if local counsel was unavailable, either because they were
14 unwilling or unable to perform because they lack the degree of experience, expertise, or
15 specialization required to handle properly the case.'" *Barjon v. Dalton*, 132 F.3d 496, 500
16 (9th Cir. 1997) (*quoting Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

17 6. Fee Contracted Between the Attorney and the Client is Contingent

18 The fee contracted between the attorney and the client is contingent. **(Exhibit C,**
19 **CEC/Attorney Retainer Agreements).**

20 7. Time Limitations Imposed by the Client or the Circumstances

21 The CEC's members cannot practice their religion without their sacrament, and the
22 CEC cannot provide essential services for their members without the CEC's sacrament;
23 thus, time in this case was of the essence. Two interdictions of Plaintiffs' sacrament
24 augmented this urgency.

25 8. Value of the Rights Involved, and the Results Obtained

26 The right to practice one's religion without governmental interference is one of the
27 most important rights in the Constitution and appears at the beginning of the Bill of Rights.
28 U.S. Const. Amend. 1. The result of allowing the CEC to import, possess, and use its

sacrament during religious ceremonies is exactly the relief that this lawsuit was intended

9. Experience, Reputation, and Ability of Counsel

The experience, reputation, and ability of each of Plaintiffs' attorneys is identified in each attorney's declaration filed in support of this motion.

10. "Undesirability" of the Case

Very few attorneys are qualified to take on a RFRA case of this type. The CEC made a survey of the ten largest civil rights firms in Arizona and could not find any qualified attorneys practicing in Arizona because of the difficulty of a Schedule I RFRA case and the undesirability of taking that case on a contingency basis; therefore, Plaintiffs had to identify and retain qualified out-of-state attorneys. (See Silver Decl., Exhibit A, Decl. Osuna).

11. Nature and Length of the Relationship Between Attorney and Client

The nature and length of the professional relationship between Plaintiffs' and their attorneys are identified in each attorney's declaration filed in support of this motion.

12. Awards in Similar Actions

There have been only two other ayahuasca church cases: *Gonzales v. O Centro Beneficente União do Vegetal*, in which the government paid the UDV \$3,150,000.00 in fees and costs as part of its 2010 settlement, and *Church of the Holy Light of the Queen v. Mukasey* (the *Santo Daime* case) in 2009, in which the court awarded \$1,538,480.00 in fees and costs. In today's dollars, those amounts would be \$4,872,667 and \$2,235,085, respectively. In their declarations, each attorney has included related non-RFRA fee awards from their respective States.

F. Significant Time and Labor Were Required to Support Plaintiffs' Claim

The attorneys for Plaintiffs have submitted a detailed account of hours expended on this case, beginning in October, 2020 through the present, compiled from the contemporaneous daily time logs kept by each attorney as a matter of course. The history of this litigation, which began in 2020, is detailed in the declarations of each attorney filed in support of this motion.

1 After the *UDV* and *Santo Daime* defeats, the DEA promulgated its *Drug*
2 *Enforcement Administration Diversion Control Division Guidance Document* (“Guidance
3 Document”), which the DEA claimed was a “process in which [churches] may petition for
4 an exemption from the Controlled Substances Act.” [Guidance Document Summary pg.
5 1]. Notwithstanding numerous applications, however, the DEA has yet to approve an
6 exemption. <https://www.gao.gov/products/gao-24-106630> In the *Soul Quest of Mother*
7 *Earth* case, the DEA did not respond to Soul Quest’s petition for several years, and only
8 did so when sued by Soul Quest. Eventually the DEA denied Soul Quest’s petition under
9 the Guidance. *Soul Quest Church of Mother Earth, Inc. v. Attorney General*, No. 22-11072
10 (11th Cir. 2023). Additionally, the DEA promulgated a non-peer reviewed “study” entitled
11 *Ayahuasca: Risks to Public Health and Safety* (“DEA Risk Assessment”), *supra*. This
12 study makes several false claims and misrepresents the research of numerous peer-
13 reviewed studies, claiming these studies found that participants experienced comas,
14 seizures and cardiotoxicity, when in fact none of the peer reviewed studies used these
15 medical terms even once, nor could such adverse reactions be derived from the description
16 of the participants who supposedly consumed ayahuasca.

17 Since the time of the *UDV* and *Santo Daime* cases there have been at least 240 peer-
18 reviewed articles on the effects of ayahuasca, as well as epidemiological studies. The 120
19 peer-reviewed articles were provided by Defendants in a purported attempt to establish a
20 compelling interest as to harm. Each and every article needed to be read and vetted by
21 Plaintiffs’ counsel, in some cases necessitated talking directly with the researchers.

22 Defendants could only restrict Plaintiffs’ importation, possession, and use of
23 ayahuasca for religious purposes if Defendants could establish a compelling interest,
24 something they failed to do in both the *UDV* and *Santo Daime* cases. As in those cases, an
25 essential part of Plaintiffs’ case rested upon expert testimony. Plaintiffs’ attorneys spent
26 significant time and effort in locating experts with experience with Schedule I substances
27 used in a religious context in the areas of theology, toxicology, psychiatry (medical and
28 psychological), and epidemiology as well as determining if other experts, such as an

1 anthropologist and epistemologist, as were used in the *Santo Daime* case, were desirable.

2 The contentious nature of this litigation, reflected in Defendants' vigorous
3 opposition to Plaintiffs at every turn, has led Plaintiffs to spend extensive time on this case,
4 as well as on this in-depth motion to explicate why their attorneys' hours are reasonable.
5 One court observed, "Defendants are certainly entitled to litigate...with vigor, but they
6 cannot be heard to complain if that vigorous advocacy requires plaintiffs to expend
7 substantial amounts of time in response." *Golden Gate Audubon Society v. United State*
8 *Army Corps of Engineers*, 732 F. Supp. 1014, 1022 (N.D. Cal 1989).

9 **G. Lodestar Multiplier Is Appropriate**

10 A lodestar multiplier is necessary here to provide an adequate incentive to attract
11 skilled and experienced counsel to undertake long, protracted, and expensive RFRA cases
12 involving a Schedule I substance, such as this one, which primarily seeks injunctive relief,
13 rather than damages, from which a fully compensatory fee can be recovered. Because this
14 case was taken by counsel on a contingency basis, the "percentage of recovery method" is
15 unavailable. *Kim v. Allison*, 8 F. 4th 1170, 1180 (9th Cir. 2021).

16 Under federal law, a lodestar multiplier may be applied in the "'rare' and
17 'exceptional'" case in which superior results are achieved because of the "superior" quality
18 of the attorney's performance. *Perdue v Kenny A.*, 559 U.S. 542, 554 (2010). Courts have
19 determined that such enhancements are appropriate where they are necessary to provide
20 "fair and reasonable compensation" and where "the lodestar fee would not have been
21 'adequate to attract competent counsel,'" *Perdue*, 559 U.S. at 554 (quoting *Blum v. Stenson*,
22 465 U.S. 886, at 897, 901 (1984)). *See also Wing v. Asarco, Inc.*, 114 F.3d 986 (9th Cir.
23 1997) (upholding 2.0 multiplier); *Rodriguez v. County of Los Angeles* No. 13-56292 (9th
24 Cir. 2018) (awarding \$ 5 million in attorneys' fees, inclusive of a 2.0 multiplier).

25 An application of a 1.5 multiplier here is necessary and appropriate to conform
26 Plaintiffs' fee award to the fees found reasonable in the local legal marketplace based
27 primarily upon on three grounds:

28 First, a comparison to the multipliers applied in other cases in the community fully

1 supports the 1.5 (or 50%) enhancement requested here. *See, e.g., Vizcaino v Microsoft*
2 *Corp.* 290 F.3d 1043, 1050 (9th Cir. 2002) (looking to multipliers awarded in comparable
3 cases as evidence of reasonableness); *In re NCAA Athletic Grant-In-Aid Cap Antitrust*
4 *Litig.*, 2017 U.S. Dist. LEXIS 201108, *21 (N.D. Cal., Dec. 17, 2017, No. 4:14-md-2541-
5 CW, 4:14-cv-02758-CW) (3.66 multiplier found reasonable as lodestar cross-check for
6 common fund fee), *aff'd* 768 Fed. Appx. 651, 2019 U.S. App. LEXIS 11474 (9th Cir. 2019).
7 These comparable awards support Plaintiffs' contention that the 1.5 lodestar multiplier
8 requested here is well within, and indeed substantially lower than, the multipliers applied
9 in comparable complex cases.

10 Secondly, the results obtained by litigating this case through to a settlement are truly
11 exceptional. As explained herein, this settlement will have profound impacts on all
12 religious organizations seeking an exemption under the CSA, not just for the members of
13 the CEC, but for all religious organizations similarly situated throughout the nation. More
14 specifically, this settlement constitutes an exceptional result by any measure. First and
15 foremost, it afforded Plaintiffs essentially all the relief they sought and could achieve,
16 including all the relief they could have secured had this case gone to trial. There has not
17 been a successful RFRA case of this kind in over fifteen years.

18 Aside from the exceptional results achieved, as discussed herein, Plaintiffs' counsel
19 had to overcome numerous obstacles to obtain such widespread systemic relief. Every
20 conceivable defense appears to have been raised by Defendants, many of which would
21 have derailed, or greatly diminished, Plaintiffs' victory had their counsel not been so
22 skillful in responding to them. Each issue and sub-issue had to be thoroughly analyzed and
23 addressed, which counsel did with almost uniform success. That level of success, achieved
24 against Defendants with the vast resources of the federal government and highly capable
25 representation from main Justice, is undeniably exceptional. Substantively, the settlement
26 reached between the parties is among the first to set forth guidelines for allowing similarly
27 situated religious organizations to obtain an accommodation from the CSA. The previous
28 absence of a blueprint to accomplish that result makes it even more exceptional. This case

1 will have a major impact on the legal landscape.

2 Thirdly, a multiplier is appropriate and reasonable in light of the need to attract
3 competent counsel willing and able to take on massive challenges to religious organizations
4 that are being prevented from using a sacrament that contains trace elements of a Schedule
5 I substance. *See, e.g., Guam Soc’y of Obstetricians & Gynecologists v Ada*, 100 F.3d 691,
6 697 (9th Cir 1996) (2.0 multiplier appropriate when “necessary” to attract competent
7 counsel); *Chabner v United of Omaha Life Ins. Co.* 1999 U.S. Dist. Lexis 16552, *19 (N.D.
8 Cal., Oct. 12, 1999, No. C-95–0447 MHP), *aff’d* (9th Cir. 2000) 225 F.3d 1042.

9 A multiplier is particularly appropriate in cases like this seeking injunctive relief
10 that are taken on a contingency with no monetary damages from which to receive a fully
11 compensatory fee. Contingency RFRA cases, such as this one, seeking only injunctive
12 relief, provide significantly less incentive for highly skilled attorneys to take them than
13 damages cases. The latter, unlike the former, provide a large pool from which to recover a
14 fee that reflects the full panoply of relevant factors, including contingent risk, preclusion
15 of other employment, and the like. As a result, the financial incentives to take injunctive
16 relief actions like this one are significantly diminished, to the detriment of the public
17 interest and the policies underlying the RFRA and other similar civil rights statutes.

18 The modest multiplier sought here would serve to restore some of that incentive.
19 The expense and risk of RFRA litigation of this kind has not diminished over the years; to
20 the contrary, the pursuit of these cases is in many ways more difficult than ever. As a result,
21 very few lawyers are willing to take on such litigation, and the few who are willing to do
22 so can only continue in their efforts if their fee awards reflect full market value, and where
23 appropriate multipliers are awarded in the exceptional cases in which they are justified.

24 **H. Fees for Fee Motion and Preparation of Lodestar Documentation**

25 Plaintiffs’ attorneys are entitled to fees for their work seeking to recover fees and
26 costs (“fees on fees”). *American Immigration Council v. DHS*, 82 F. Supp. 3d 396, 413-14
27 (D.D.C. 2015); *Hajro v. U.S. Citizenship and Immigration Services*, 900 F. Supp. 2d 1034,
28 1050 (N.D. Cal. 2012). It is “well-established that time spent in preparing fee applications

under 42 U.S.C. § 1988 is compensable.” *Gonzalez v. City of Maywood*, 729 F. 3d 1196, 1210 (9th Cir. 2013). In this Motion, Plaintiffs have spent the reasonable hours necessary to meet their burden of “documenting the appropriate hours expended” in the litigation and to explain to the Court the tasks necessary for Plaintiffs to prevail. *See Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1148 (N.D. Cal. 2014). Plaintiffs have also spent the reasonable hours necessary to meet their further burden “to produce satisfactory evidence ‘that the requested rates are in line with those prevailing in the community.’” *Id.* at 1152.

The following Table summarizes the rates sought for the attorneys who performed work on behalf of Plaintiffs, along with the hours worked on this litigation for which Plaintiffs’ seek attorneys’ fees. (Decl. Jack Silver, ¶112; Exhibit H; Decl. of Sean M. McAllister, ¶4; Exhibit A; Decl. Gilbert Paul Carrasco, ¶3; Exhibits A and B; Decl. Martha J. Hartney, ¶¶95,96; Exhibit A; Decl. Ismail L. Ali, ¶4; Exhibit A)

Attorney	Hours	Lodestar	Fees	Fees +1.5 Multiplier
Jack Silver	438.1	\$875.00	\$383,337.50	\$575,006.25
Sean M. McAllister	322.5	\$650.00	\$209,625.00	\$314,437.50
Gilbert Paul Carrasco	500	\$895.00	\$447,500.00	\$671,250.00
Martha J. Hartney	564.15	\$550.00	\$310,282.50	\$465,423.75
Ismail L. Al	150	\$550.00	\$82,253.00	\$123,378.80
Total	---	----	\$1,432,998.00	\$2,149,496.30

Paralegal fees are also requested on behalf of Attorneys Silver and Carrasco in the sum of \$23,225.00 and \$1,100.00, respectively. (*see* Decl. Silver, ¶114, Exhibit I; Decl. Carrasco, ¶3, Exhibit C.

III. CONCLUSION

Plaintiffs’ attorneys have appropriately explained the significance of their accomplishments, a relevant factor for this Court’s award. *See Judicial Watch v. DOC*, 470 F.3d 363, 369 (D.C. Cir. 2006). The contentious nature of this litigation described herein

1 required Plaintiffs' counsel to spend extensive time on this case, as well as on this in-depth
 2 motion to justify their attorneys' hours as reasonable. See *Los Angeles Gay & Lesbian*
 3 *Cnty. Servs. Ctr. v. IRS*, 559 F. Supp. 2d 1055, 1061 (C.D. Cal. 2008) (having necessitated
 4 extensive litigation, the government cannot complain about the extent of fees generated in
 5 countering government opposition). "The 'most critical factor' a court must assess in
 6 fashioning a fee award is the degree of success obtained." Roy L. Brooks, Gilbert Paul
 7 Carrasco, & Michael Selmi, *The Law of Discrimination: Cases and Perspectives*, at 968-
 8 69 (Lexis/Nexis, 2011), *citing Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

9 In view of the foregoing, Plaintiffs' respectfully request an award of their reasonable
 10 attorneys' fees and costs incurred in this action in the amount of \$2,149,496.30 attorneys'
 11 fees, \$65,391.95 costs, and \$24,375.00 paralegal fees.

12
 13 DATED: June 17, 2024

Respectfully submitted,

14
 15 s/ Jack Silver

Jack Silver, *pro hac vice*

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Attorneys for Plaintiffs

STATEMENT OF CONSULTATION

I hereby certify that the parties have conferred regarding the instant motion for attorneys' fees. As discussed in this Statement, after several exchanges of offers and following personal consultation and good faith efforts to do so, the parties have been unable satisfactorily to resolve all disputed issues relating to attorneys' fees and costs.

On April 17, 2024, Plaintiffs provided Defendants' counsel, Giselle Barcia, with Plaintiffs' Request for Attorneys' Fees and Costs, which included a lengthy brief,

1 declarations for all five attorneys, summaries of fees and costs, and copies of all invoices
2 and receipts.

3 Late on Friday May 24, 2024, before the three-day Memorial Holiday weekend,
4 Ms. Barcia provided Plaintiffs with Defendants' counter offer.

5 On May 31, 2024, in the morning, after consultation with Plaintiffs, I sent Ms.
6 Barcia Plaintiffs' response to her counter offer and requested she advise me as to her
7 availability the following week to personally discuss settlement and make a good faith
8 effort to resolve all disputed issues relating to attorneys' fees and costs.

9 On June 5, 2024, the parties conducted a personal consultation and made good faith
10 efforts satisfactorily to resolve all disputed issues relating to attorneys' fees and costs.
11 Representing all counsel, attending the conference for Plaintiffs were Jack Silver, Sean
12 McAllister, Gilbert Carrasco and Martha Hartney. Attending the conference for Defendants
13 was Ms. Barcia. Prior to this meeting the parties had exchanged settlement offers. At the
14 meeting Plaintiffs' counsel agreed to provide Defendants with a further counter offer of
15 settlement.

16 On June 7, 2024, Plaintiffs provided Defendants' counsel with a further counter
17 offer and included additional information regarding Plaintiffs' entitlement to attorneys'
18 fees and costs.

19 On June 10, 2024, Ms. Barcia responded to Plaintiffs' second counter offer but
20 would not provide a counter offer.

21 On June 11, 2024, I responded to Ms. Barcia, advising her that absent a counteroffer
22 from Defendants, the parties' negotiations have come to an end.

23 On June 14, 2024, Ms. Barcia responded to my email of June 11, 2024, and provided
24 a counteroffer similar to her previous offer.

25 On June 14, 2024, Plaintiffs, having already substantially reduced their initial
26 proposal for attorneys' fees, informed Ms. Barcia that the parties were just too far apart
27 and Plaintiffs would be filing their fees motion on June 17, 2024.

28

s/ Jack Silver
Jack Silver, *pro hac vice*
Law Office of Jack Silver

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing a copy to the following CM/ECF registrant:

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